

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

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date: August 05, 2009

to: Associate Area Counsel (Jacksonville, Group 2)
(Small Business/Self-Employed)

from: Chief, Branch 4
(Procedure & Administration)

subject:

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

LEGEND

Decedent:

Decedent's Wife:

Decedent's Estate:

Property:

Purchaser:

Date 1:

Date 2:

Date 3:

Date 4:

Date 5:

Date 6:

Date 7:

Date 8:

Date 9:

Date 10:

Date 11:

Date 12:

Date 13:

Amount 1:

Amount 2:

Country:

ISSUE

Whether the Service's administrative sale of the Property conveyed both the Decedent's Estate's interest in the Property and the interest of Decedent's Wife, who held the Property with Decedent as tenants by the entirety.

CONCLUSIONS

The Service's administrative sale of the Property conveyed only the Decedent's Estate's interest in the Property.

FACTS

Decedent died on Date 1. Decedent's Wife, the executrix of Decedent's Estate, filed an estate tax return on Date 2, pursuant to which the Service assessed a tax liability of over Amount 1. Instead of paying the taxes due, Decedent's

Wife liquidated most of Decedent's Estate's assets and transferred the funds out of the country to herself. As we understand it, the Service never assessed a transferee or fiduciary liability against Decedent's Wife.

Currently, Decedent's Wife lives in Country. There are only two estate assets remaining in the United States, one of which is the Property, which Decedent and Decedent's Wife owned as tenants by the entirety. The outstanding balance of Decedent's estate tax liability is over Amount 2.

In Date 3, the Service issued a Form 668-B, Levy, seizing the Property. The Form 668-B contained a correct legal description of the Property and was for both Decedent's estate tax liability and Decedent's Wife's liability as a transferee of assets included in the gross estate. In Date 4, the Service issued a notice of seizure to Decedent's Wife as executrix of Decedent's Estate and as a transferee of assets included in the gross estate. As the Service never assessed a transferee liability against Decedent's Wife, the levy did not seize her interest in the Property.

On Date 5, the Service issued a Form 2434, Notice of Public Auction Sale, which stated, "Only the right, title, and interest of [Decedent's Estate] in and to the property will be offered for sale." Although the Form 2434 contained the correct address of the Property, it contained an incorrect legal description. The Service also issued a Form 2434-B, Notice of Encumbrances Against or Interests in Property Offered for Sale, which identified the federal tax lien as the only encumbrance on the Property. A "Note" on the front of the Form 2434-B states that the Service does not warrant the correctness or completeness of the information listed in the notice and provides that bidders should verify for themselves the validity of any encumbrances on the Property. In addition, sheet two of the Form 2434-B states that property is sold without recourse and that the

government makes no guaranty or warranty of any type as to the validity of the title of the Property. The notice continues, stating that no claim will be considered by the Service for the adjustment or rescission of the sale based on the failure of the Property to conform to any representation, expressed or implied.

On Date 6, the Service sold the Property at public sale to Purchaser. The Form 2435, Certificate of Sale of Seized Property, also refers only to the liability of the Decedent's Estate; it does not mention the transferee liability of Decedent's Wife.

On Date 7, following the redemption period, the Service issued a Deed of Real Estate to Purchaser. The deed stated that the Service "[did] quitclaim unto said grantees all the estate, right, title, and interest which the said Estate of [Decedent] had on and after the tax assessment date of Date 8, when the federal tax lien of the United States for unpaid taxes did attach to such estate, right, title, and interest, as recorded by a notice of federal tax lien filed Date 9, in and to" the Property. Again, an erroneous legal description was referenced in the deed; however, the street address for the Property was correct,

The Purchaser of the Property informed the Service that the absence of Decedent's Wife's name on the deed has caused difficulty in recording this conveyance. To date, the deed remains unrecorded. Purchaser has also requested that the Internal Revenue Service correct the legal description.

LAW AND ANALYSIS

Section 2040(a) of the Internal Revenue Code provides that a decedent's gross estate includes the value of property held as tenants by the entirety by the decedent and the decedent's spouse. Section 2040(b) provides that notwithstanding section 2040(a), the value of certain joint interests of husband and wife included in the gross estate is one-half the value of the "qualified joint interest." Qualified joint interests include property held by the decedent and the decedent's spouse as tenants by the entirety; therefore, Decedent's gross estate included one-half the value of the Property.

Section 6324(a) provides that unless the estate tax "is sooner paid in full, or becomes unenforceable by reason of lapse of time, it shall be a lien upon the gross estate of the decedent for 10 years." The estate tax lien attaches to a decedent's gross estate without assessment at the time of the decedent's death. Detroit Bank v. United States, 317 U.S. 329, 332 (1942). The Court in Detroit Bank determined that because the amount of the estate tax/estate tax lien is based in part on the value of entireties property, and the property to which the estate tax lien attaches is the gross estate, which includes entireties property, the lien attaches to entireties property. Id. at 333. The Court stated that it "cannot impute to Congress an intention not disclosed by the statute or its legislative history to exclude from the tax lien property which it directs to be included in the decedent's gross estate for the purpose of computing the tax." Id. Therefore, the estate tax lien attaches to entireties property to the extent of the value of the property in the gross estate, a one-half interest under section 2040(b).

The Notice of Public Auction Sale stated that the Property offered for sale was “[o]nly the right, title, and interest of [Decedent’s Estate]. . . .” The deed itself provided that the grantor “[d]oes quitclaim unto the said grantee [Purchaser] all the estate, right, title, and interest which the said Estate had on and after the tax assessment date of Date 8. . . .” The interest of Decedent’s Estate in the Property was a one-half interest; therefore, Purchaser bought a one-half interest in the Property. The fact that Purchaser, and even the Service, thought that the Service was selling the entire interest in the Property is of little import. The quitclaim deed transferred only Decedent’s Estate’s interest in the Property, which was in fact the interest advertised by the notice of public sale. Decedent’s Wife’s interest in the Property, which became a simple one-half interest once the Property was sold pursuant to the Service’s tax lien, remains in the Property.

Section 6324(b) of the Internal Revenue Code provides that if the estate tax is not paid when due, the transferee of property in the gross estate shall be personally liable for the estate tax to the extent of the value of the property transferred. An executor may be liable as a transferee under section 6324(b) “simply by being in possession of property of the decedent as to which the estate tax was not paid.” Wilkes v. United States, 50 F.Supp.2d 1281, 1285 (M.D. Fla. 1999). According to the facts that you gave us, Decedent’s Wife/executrix of the Decedent’s Estate liquidated all but two assets of the gross estate and transferred the proceeds out of the country to herself. Under section 6324(b), Decedent’s Wife is personally liable for Decedent’s estate tax liability as a transferee to the extent of the value of the funds garnered from the liquidation of property of Decedent’s Estate. Decedent’s Wife’s only property in the United States is the Property. As a one-half interest in the Property was sold for the estate taxes of Decedent, a one-half interest remains from which Decedent’s Wife’s transferee liability may be collected.

There are two procedures the Service may use to impose personal liability on a transferee under section 6324(a)(2): 1) the transferee liability procedures under section 6901, pursuant to which the Service may assess and collect a transferee liability in the same manner as in the case of the estate tax liability with respect to which it was incurred; or 2) the filing of a suit under section 6502(a). See United States v. Russell, 461 F.2d 605, 606 (10th Cir. 1972); United States v. Degroft, 539 F. Supp. 42, 44-45 (D. Md. 1981). An assessment under section 6901 is not a prerequisite to filing a suit to impose personal liability for unpaid estate taxes under section 6324(a)(2). Leighton v. United States, 289 U.S. 506 (1933); however, an assessment is necessary to administratively collect the transferee liability.

To collect a transferee liability administratively under section 6901, the Service must assess the transferee liability within one year after the expiration of the period of limitations for assessment against the transferor, in this case Decedent’s Estate. The period of limitations for assessing Decedent’s Estate’s tax liability expired on Date 10, three years after the filing of the estate tax return. The period of limitations for assessing a transferee liability for the Decedent’s Wife, which we understand the

Service has not yet done, expired one year later, on Date 11. Therefore, at this time the Service may not timely assess a transferee liability against Decedent's Wife and administratively sell her interest in the Property. A suit to reduce Decedent's Wife's transferee liability to judgment and to sell her interest in the Property would have to be filed by Date 12, ten years after the assessment of the estate tax liability. Degroft at 44. No assessment against the transferee is required for a court ordered sale.

Section 6901 also provides for the assertion of a fiduciary liability under 31 U.S.C. § 3713(b). Section 3713(b) provides that if a representative of an estate pays any part of a debt of the estate before paying a claim of the United States, the representative is liable to the United States to the extent of the payment for unpaid claims of the United States. Section 7701(a)(6) defines a fiduciary to mean a "guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person." Emphasis added.

Pursuant to section 3713(b) the "personal representative of an estate is personally liable for the unpaid claims of the United States to the extent of the distribution, if the Government establishes the following: (1) The personal representative distributed assets of the estate; (2) the distribution rendered the estate insolvent; and (3) the distribution took place after the personal representative had notice of the government's claim." Allen v. C.I.R., 1999 WL 1063545 (1999)(executor found liable for fiduciary liability after distributing assets of the estate to himself without paying the estate tax); see United States v. Coppola, 85 F.3d 1015, 1020 (2d Cir.1996) (executor's distribution of estate assets to family members, rendering estate insolvent, before satisfying estate tax debt to the United States violated 31 U.S.C. sec. 3713(b) and made the personal representative personally liable for the taxes).

Decedent's Wife, after filing an estate tax return showing taxes due and knowing that Decedent's estate taxes had not been paid, liquidated most of the Decedent's Estate and distributed the proceeds to herself instead of using them to pay Decedent's estate tax. Presumably, this made Decedent's Estate insolvent. If so, Decedent's Wife is personally liable for the payment of the estate taxes to the extent of the value of the property that she liquidated and distributed.

Section 6901(c)(3) provides that a fiduciary liability must be assessed within one year after the liability arises or not later than the expiration of the period for collecting the tax in respect of which the liability arises, whichever is later. Under section 6502(a), the Service must collect the estate tax liability within 10 years after the assessment of the estate tax. The Service assessed the estate tax on Date 8; therefore, it has until Date 13 to assess the fiduciary liability against Decedent's Wife.

CONCLUSION

The sale to Purchaser of the interest of the Decedent's Estate in the Property was valid; it conveyed the interest contained in the gross estate, which under section 2040 was a one-half interest. The deed has not yet been filed; so the Service may amend the deed

to reflect the correct property description. The sale did not convey the remaining one-half interest of Decedent's Wife; however, there is still time to assess a fiduciary liability under section 6901 and sell the interest administratively. Alternatively, the United States could file a suit in federal district court to have the remaining one-half interest of the Decedent's Wife sold judicially. We recommend administratively assessing the fiduciary liability against Decedent's Wife, and upon assessment, administratively seizing and selling her one-half interest in the Property.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (202) 622-3630 if you have any further questions.